

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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VICTOR RUECKL,

Plaintiff,

v.

INMODE, LTD.,

Defendant.

Case No. 2:19-cv-02186-KJD-NJK

**ORDER**

Presently before the Court is Defendant InMode Ltd.'s Motion to Dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted (ECF No. 10). Plaintiff, Victor Rueckl filed a response in opposition (ECF No. 17), to which InMode replied (ECF No. 26). Also before the court is Rueckl's Motion for Limited Jurisdictional Discovery (ECF No. 38).

**I. Background**

In 2014, Brian Lodwig, the president of Invasix Inc., approached Rueckl at a marketing dinner in Colorado and asked Rueckl if he would be interested marketing and selling InMode devices and technology. Pl.'s Resp. 4, ECF No 17. Rueckl is a Las Vegas dermatologist and skin cancer surgeon and has been licensed in Nevada since 1981. Compl. ¶ 4, ECF No. 1. InMode is a provider of surgical and medical treatment solutions and is incorporated under the laws of Israel with its principal place of business in Israel. Mot. to Dismiss 6, ECF No. 10. InMode was incorporated in 2008 under the name Invasix Ltd. and changed its name to InMode Ltd. in 2017, although it was using the InMode name as early as 2014. Compl. ¶ 5, ECF No. 1.; Pl.'s Resp. 2, ECF No 17. InMode provides medical equipment to Nevada physicians and lists all Nevada medical professionals who provide their services on their website. *Id.* at 10. Invasix Inc., a subsidiary of InMode was incorporated under the laws of Delaware in 2008 with its principal

1 place of business in Lake Forest, California. Mot. to Dismiss 8, ECF No. 10.

2 Rueckl agreed to market and sell InMode technologies for compensation in stock options.  
3 Pl.'s Resp. 4, ECF No 17. Lodwig advised Rueckl that he would discuss the mode of  
4 compensation with Moshe Mizrahy, CEO of InMode. Id. Lodwig introduced Rueckl to Mizrahy  
5 in 2013 where Mizrahy represented Lodwig's position as president of InMode. Id. at 8. In 2016,  
6 Lodwig orally informed Rueckl, who was promoting InMode at a Las Vegas event, that Mizrahy  
7 agreed to compensate Rueckl with 5,000 stock options, with a strike price of \$1.00, in exchange  
8 for marketing and promoting InMode products. Id. at 4. No other terms were specified. Mot. to  
9 Dismiss 8, ECF No. 10. Rueckl inquired about the need for written documentation but Lodwig  
10 assured him there was no need because Rueckl was "on the list" and that "Moshe has directed  
11 this." Pl.'s Resp. 4, ECF No 17.

12 Based on this alleged compensation agreement, Rueckl agreed to provide – and did in  
13 fact provide – several services for InMode including: speaking and conducting InMode product  
14 training sessions in several cities including Las Vegas; and training, in Las Vegas, over fifty  
15 doctors and their staff on the use of InMode treatments. Id. at 5. Rueckl received no other form  
16 of compensation for his services. Id.

17 In or around May 2017, InMode, through Lodwig, sought to retain Rueckl's assistance in  
18 the case Syneron Medical Ltd. v. Invasix, Inc. et al. Rueckl alleges that he and Lodwig orally  
19 agreed to compensation in the form of 5,000 stock options, with a strike price of \$1.00, in  
20 exchange for his expertise. Id. Pursuant to this arrangement, Rueckl put in extensive time  
21 meeting with InMode's attorneys, including several in-person meetings, a review of facts, and a  
22 deposition. Id. Again, Rueckl received no other form of compensation for his services. Id.

23 On September 12, 2019, a month after InMode made its initial public offering, Rueckl  
24 emailed Mizrahy asking what information was needed to effectuate the transfer of his options. Id.  
25 Mizrahy responded that Rueckl was not on InMode's list of option holders. Id. After Rueckl  
26 responded that Lodwig advised him that he was on the list, Mizrahy stated that Lodwig, who was  
27 not – and never was – employed by InMode, never discussed the matter with him, and that only  
28 the Board of Directors had the authority to agree to compensation in the form of options. Id. at 6.

1 On December 19, 2019, Rueckl initiated this lawsuit against InMode and alleged six  
 2 causes of action: (1) negligent misrepresentation; (2) breach of contract; (3) breach of the  
 3 implied covenant of good faith and fair dealing; (4) promissory estoppel; (5) unjust enrichment;  
 4 and (6) fraud. Compl., ECF No. 1.

5 On February 7, 2020, InMode moved to dismiss. Mot. to Dismiss, ECF No. 10. InMode  
 6 argued they did not have the minimum contacts necessary for personal jurisdiction, and  
 7 additionally claimed that jurisdiction cannot be established against them merely by the contacts  
 8 of their subsidiary, Invasix Inc. Mot. to Dismiss 9–12, ECF No. 10; Def.’s Reply 4–8, ECF No.  
 9 26. InMode also argued that Rueckl failed to state valid claims Mot. to Dismiss 12–17, ECF No.  
 10 10. In his response, Rueckl requested leave to amend should the court grant InMode’s motion.  
 11 Additionally, on June 11, 2020, Rueckl moved for limited jurisdictional discovery.

## 12 **II. Personal Jurisdiction**

### 13 **A. Fed. R. Civ. P. 12(b)(2) Legal Standard**

14 A court may dismiss a complaint for lack of personal jurisdiction over the defendant. Fed.  
 15 R. Civ. P. 12(b)(2). Plaintiff bears the burden of establishing personal jurisdiction over each  
 16 defendant. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, (2011). When  
 17 a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without holding an  
 18 evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to  
 19 withstand the motion to dismiss. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995) (citing  
 20 Pacific Atlantic Trading Co. v. M/V Main Exp., 758 F.2d 1325, 1327 (9th Cir. 1985)). That is,  
 21 the plaintiff need only demonstrate facts that if true would support jurisdiction over the  
 22 defendant. Data Disc, Inc. v. Systems Technology Assos., 557 F.2d 1280, 1285 (9th Cir. 1977).  
 23 The plaintiff's allegations “may not be merely conclusory, but must assert particular  
 24 jurisdictional facts which establish the necessary ties between the defendant and the forum state.”  
 25 Pocahontas First Corp. v. Venture Planning Group, Inc., 572 F. Supp. 503, 506 (D. Nev. 1983).  
 26 Moreover, a court resolves conflicts in the parties' affidavits in favor of the non-moving party.  
 27 Holland Am. Line Inc. v. Wärtsilä N. Am., Inc., 485 F.3d 450, 457 n. 5 (9th Cir. 2007).  
 28 However, for purposes of personal jurisdiction, a court “may not assume the truth of allegations

1 in a pleading which are contradicted by affidavit.” Data Disc, Inc., 557 F.2d at 1284.

2 To establish personal jurisdiction, the plaintiff must show that the forum's long-arm  
3 statute grants personal jurisdiction over the out-of-state defendant and that the exercise of  
4 jurisdiction does not violate federal constitutional principles of due process. Haisten v. Grass  
5 Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 (9th Cir. 1986). The Nevada long-  
6 arm statute, NRS 14.065, provides that a court within Nevada can exercise personal jurisdiction  
7 over a defendant to the full extent that the United States Constitution permits. Baker v. Eighth  
8 Judicial Dist. Court, 116 Nev. 527, 531 (2000). In turn, the Due Process Clause of the United  
9 States Constitution allows a court to exercise personal jurisdiction over a defendant only when  
10 the defendant has sufficient “minimum contacts” with a forum state so that the exercise of  
11 jurisdiction does not offend “traditional notions of fair play and substantial justice.” Int'l Shoe  
12 Co. v. Washington, 326 U.S. 310, 316 (1945).

### 13 **B. Analysis**

14 As a preliminary matter, the Court addresses InMode’s declaration that Lodwig, the  
15 president of Invasix Inc., was never an employee, officer, or director of InMode. While this may  
16 be true, it does not contradict Rueckl’s claim that InMode and Mizrahy held Lodwig out as their  
17 president and representative. As such, the Court accepts Rueckl’s version of the uncontradicted  
18 facts as true. See Data Disc, Inc., 557 F.2d at 1284.

19 Accordingly, the Court disregards InMode’s Alter Ego Theory argument, made in  
20 response to Rueckl’s opposition to the Motion to Dismiss. Contrary to InMode’s insinuation,  
21 Rueckl is not attempting to haul InMode to Nevada under an Alter Ego Theory, based on their  
22 subsidiary’s minimum contacts. Rather, Rueckl is attempting to assert jurisdiction based on  
23 InMode’s contacts for causes of action that arise out of an agency theory of apparent authority.  
24 See Great Am. Ins. Co. v. Gen. Builders, Inc., 934 P.2d 257, 261 (Nev. 1997) (a party claiming  
25 an agent had apparent authority must show: “(1) that he subjectively believed that the agent had  
26 authority to act for the principal and (2) that his subjective belief in the agent's authority was  
27 objectively reasonable”); see also N. Nev. Mobile Home Brokers v. Penrod, 96 Nev. 394, 397  
28 (1980) (asserting that existence or non-existence of an agency relationship is a question of fact

for the jury). Therefore, if InMode has sufficient minimum contacts with Nevada so that the exercise of jurisdiction is not unreasonable, personal jurisdiction is proper. Because Rueckl is not alleging that general jurisdiction exists, the Court will analyze whether specific jurisdiction is appropriate

### 1. Specific Jurisdiction

The Court applies a three-prong test to determine whether a defendant's contacts with the forum are sufficient to confer specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable.

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). The plaintiff bears the burden of proving the first two prongs of the test. CollegeSource, Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1076 (9th Cir. 2011). If the plaintiff succeeds, the burden shifts to the defendant to make a “compelling case” that jurisdiction would be unreasonable. Id.

The “purposeful availment analysis is most often used in suits sounding in contract.” Id. When the plaintiff brings both contract and tort claims, the plaintiff must only demonstrate personal jurisdiction on one claim because the Court may exercise pendent jurisdiction over the additional claims so long as they arise out of a common nucleus of operative fact. See Action Embroidery Corp. v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004). Accordingly, the Court will have jurisdiction if InMode purposefully availed itself of the privileges of conducting business in Nevada.

#### i. Purposeful Availment

The “purposeful availment analysis turns upon whether the defendant's contacts are attributable to his own actions or solely to the actions of the plaintiff.” Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 840 (9th Cir.1986). A defendant has purposefully availed itself of a forum when it exhibits some kind of affirmative conduct allowing or

1 promoting business transactions within the forum state. Id.; see also Ballard v. Savage, 65 F.3d  
2 1495, 1498 (9th Cir. 1995) (stating that a party purposely avails itself of a forum when it “has  
3 taken deliberate action within the forum state or ... has created continuing obligations to forum  
4 residents.”). However, a contract between a defendant and a resident of the forum – without  
5 more – is insufficient to confer personal jurisdiction. Boschetto v. Hansing, 539 F.3d 1011, 1017  
6 (9th Cir. 2008).

7 Although InMode’s alleged contract with a Nevada resident, itself, is insufficient to  
8 confer personal jurisdiction, InMode allowed and promoted business transactions in the forum  
9 state. While InMode claims it does not specifically target Nevada in its business ventures, it does  
10 sell medical equipment to Nevada doctors for use on Nevada residents. Mot. to Dismiss 8, ECF  
11 No. 10; Pl.’s Resp. 2, ECF No 17. Their website lists many Nevada medical offices which offer  
12 InMode products. Rueckl also provided several InMode product trainings, on behalf of InMode,  
13 in Nevada. Accordingly, the Court finds that InMode availed itself of the privileges and benefits  
14 of doing business in Nevada.

## 15 **ii. Forum-Related Activities**

16 The second prong of the test is whether plaintiff’s claim arises out of activity conducted  
17 in the forum state. Schwarzenegger, 374 F.3d at 802. The mere existence of a contract between  
18 the defendant and a resident of the forum state is not enough. Roth v. Garcia Marquez, 942 F.2d  
19 617, 621 (9th Cir. 1991). Rather, the Court examines the “continuing relationships and  
20 obligations with citizens of the [forum].” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473,  
21 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). The Court also considers the circumstances  
22 surrounding formation of the contract including “prior negotiations and contemplated future  
23 consequences, along with the terms of the contract and the parties’ actual course of dealing.” Id.  
24 at 479.

25 Rueckl’s declaration claims that InMode’s connections to Nevada are more significant  
26 than just the alleged agreement. InMode held events in Las Vegas where it promoted its  
27 products, and which Rueckl participated in. Rueckl held training sessions in Las Vegas where he  
28 introduced InMode products in exchange for the stock options at issue as alleged compensation.

1 Per Rueckl, InMode sought his services to promote its products at conferences and workshops in  
 2 Las Vegas. InMode's contacts extended beyond a mere contact with Nevada residents, and  
 3 accordingly, Rueckl's claims arise out of InMode's activities in Nevada.

### 4 **iii. Reasonableness**

5 The final prong of the analysis shifts the burden to InMode to present a "compelling  
 6 case" that jurisdiction in Nevada would be unreasonable. Schwarzenegger, 374 F.3d at 802. This  
 7 is a high bar because there is a "presumption of reasonableness" once a plaintiff has satisfied the  
 8 first two elements of the test. See Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784  
 9 F.2d 1392, 1397 (9th Cir. 1986). The Court looks to seven factors to determine whether personal  
 10 jurisdiction is reasonable:

11 (1) the extent of the defendant's purposeful interjection into the affairs of the forum  
 12 state; (2) the burden on the defendant of defending in the forum; (3) the extent of  
 13 conflict with the sovereignty of the defendant's state; (4) the forum state's interest  
 14 in adjudicating the dispute; (5) the most efficient judicial resolution of the  
 controversy; (6) the importance of the forum to the plaintiff's interest in convenient  
 and effective relief; and (7) the existence of an alternative forum.

15 CE Distribution, LLC v. New Sensor Corp., 380 F.3d 1107, 1112 (9th Cir. 2004). InMode failed  
 16 to present any case that jurisdiction would be unreasonable, and, additionally, the factors do not  
 17 overwhelmingly favor InMode. Therefore, jurisdiction is reasonable.

18 Factors one, four, five, six, and seven favors Rueckl and jurisdiction. InMode interjected  
 19 itself into the forum when it sought to market its products in Nevada and allegedly contracted  
 20 with a Nevada doctor to promote its products. Additionally, Nevada has a "substantial interest"  
 21 in adjudicating the dispute of its residents. See CE Distribution, 380 F.3d at 1112 ("The forum  
 22 state has a substantial interest in adjudicating the dispute of one of its residents who alleges  
 23 injury due to the tortious conduct of another."). Rueckl alleges both breach of contract and tort  
 24 claims against InMode. Thus, Nevada has an interest in adjudicating this case. Furthermore,  
 25 because the dispute revolves around services that were largely performed in Nevada, many of the  
 26 witnesses would be located in Nevada which may make Nevada a more efficient forum. If  
 27 jurisdiction is denied, the alternative forum would be Israel, and, although "not of paramount  
 28 importance," the plaintiff's decision to litigate in its home forum is "obviously most convenient."

1 Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1133 (9th Cir.  
2 2003).

3 While factors two and three may lean in favor of InMode, they failed to present a  
4 compelling, or even non-compelling, case for why jurisdiction in Nevada is unreasonable.  
5 Accordingly, the Court finds that personal jurisdiction over InMode in Nevada is reasonable and  
6 denies InMode's motion to dismiss for lack of personal jurisdiction.

### 7 **III. A Claim Upon Which Relief May be Granted**

#### 8 **A. Fed. R. Civ. P. 12(b)(6) Legal Standard**

9 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action  
10 that fails to state a claim upon which relief can be granted. See N. Star Int'l v. Ariz. Corp.  
11 Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule  
12 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not  
13 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. See  
14 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is  
15 sufficient to state a claim, the Court will take all material allegations as true and construe them in  
16 the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th  
17 Cir. 1986).

18 The Court, however, is not required to accept as true allegations that are merely  
19 conclusory, unwarranted deductions of fact, or unreasonable inferences. See Sprewell v. Golden  
20 State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
21 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
22 is plausible, not just possible. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550  
23 U.S. at 555).

24 “Generally, a district court may not consider any material beyond the pleadings in ruling  
25 on a Rule 12(b)(6) motion.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542,  
26 1555 n.19 (9th Cir. 1990) (citations omitted). However, “documents whose contents are alleged  
27 in a complaint and whose authenticity no party questions, but which are not physically attached  
28 to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without

1 converting the motion to dismiss into a motion for summary judgment. Branch v. Tunnell, 14  
 2 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may take judicial  
 3 notice of “matters of public record.” Mack v. S. Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir.  
 4 1986). Otherwise, if the district court considers materials outside the pleadings, the motion to  
 5 dismiss is treated as a motion for summary judgment, and all parties are given the opportunity to  
 6 present all material pertinent to the motion. See Arpin v. Santa Clara Valley Transp. Agency,  
 7 261 F.3d 912, 925 (9th Cir. 2001); Fed. R. Civ. P. 12(d).

8 If the court grants a motion to dismiss, it must then decide whether to grant leave to  
 9 amend. The court should “freely give” leave to amend when there is no “undue delay, bad  
 10 faith[,] dilatory motive on the part of the movant ... undue prejudice to the opposing party by  
 11 virtue of ... the amendment, [or] futility of the amendment ....” Fed. R. Civ. P. 15(a); Foman v.  
 12 Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that  
 13 the deficiencies of the complaint cannot be cured by amendment. See DeSoto v. Yellow Freight  
 14 Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

## 15 **B. Analysis**

### 16 **1. Breach of Contract (Claim 2)**

17 To state a claim for breach of contract in Nevada, a Plaintiff must demonstrate (1) the  
 18 existence of a valid contract, (2) that plaintiff performed or was excused from performance, (3)  
 19 that the defendant breached, and (4) that the plaintiff sustained damages. See Calloway v. City of  
 20 Reno, 993 P.2d 1259, 1263 (Nev. 2000). “Basic contract principles require, for an enforceable  
 21 contract, an offer and acceptance, meeting of the minds, and consideration.” May v. Anderson,  
 22 119 P.3d 1254, 1257 (Nev. 2005). However, “contracts made in contravention of the law do not  
 23 create a right of action.” Vincent v. Santa Cruz, 647 P.2d 379, 381 (Nev. 1982).

24 While Nevada does not require a written agreement to enforce the purchase or sale of  
 25 securities, the sale or purchase of stock options must at least be memorialized in writing. N.R.S.  
 26 § 78.200 (2018); see also N.R.S. 104.8113 (2015) (“A contract or modification of a contract for  
 27 the sale or purchase of a security is enforceable whether or not there is a writing signed or record  
 28 authenticated by a party against whom enforcement is sought.”). All relevant terms of the sale of

1 stock options must be “stated in the articles of incorporation or in a resolution or resolutions  
 2 adopted by the board of directors.” N.R.S. § 78.200. If a stock option agreement fails to satisfy  
 3 the statutory requirements, any breach of contract claim is barred by law. See Neuhaus v.  
 4 Sulphco, Inc., 2008 WL 5509796, at \*1 (Nev. Dist. Ct. Nov. 10, 2008) (ruling that a breach of  
 5 contract claim was barred as a matter of law when only two of the three directors signed the  
 6 stock option agreement because N.R.S. 78.200 required the signatures of all board members).

7 Regardless of Rueckl’s assertion that the agreement had all the necessary material terms  
 8 of a valid contract, he never contested that this was in fact an oral agreement. The agreement’s  
 9 terms were never alleged to be stated in InMode’s articles of incorporation or in any resolution  
 10 adopted by the board of directors. Therefore, Rueckl’s breach of contract claim is barred as a  
 11 matter of law. See Neuhaus, 2008 WL 5509796, at \*1. Accordingly, Rueckl has failed to state a  
 12 plausible breach of contract claim and the Court grants the Motion to Dismiss this claim.  
 13 Because the deficiencies of this claim cannot be cured by amendment, dismissal of this cause of  
 14 action is with prejudice.

## 15 **2. Breach of the Implied Covenants of Good Faith and Fair Dealing (Claim 3)**

16 Nevada law implies a covenant of good faith and fair dealing in every contract. Hilton  
 17 Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919, 922-23 (1991). To establish a claim for  
 18 breach of the implied covenant of good faith and fair dealing, a plaintiff must prove: (1) the  
 19 existence of a contract between the parties; (2) that the defendant breached its duty of good faith  
 20 and fair dealing by acting in a manner unfaithful to the purpose of the contract; and (3) the  
 21 plaintiff’s justified expectations under the contract were denied. See Perry v. Jordan, 900 P.2d  
 22 335, 338 (Nev. 1995) (citing Hilton Hotels, 808 P.2d at 922–23 (Nev. 1991)).

23 Generally, a breach of the implied covenants is a contract-based claim. Hilton Hotels, 808  
 24 P.2d at 923. However, a breach of the implied covenants can also give rise to tort liability when  
 25 there is a special relationship between the contracting parties. Id. (stating that a tort action for an  
 26 implied covenants claim requires a special element of reliance or fiduciary duty). However,  
 27 Rueckl’s did not allege a tortious breach of the covenant, rather a contractual one. See Pl.’s Resp.  
 28 17, ECF No 17.

1 A contractual breach of the implied covenant of good faith and fair dealing occurs  
 2 “[w]here the terms of a contract are literally complied with but one party to the contract  
 3 deliberately countervenes the intention and spirit of the contract.” Hilton Hotels, 808 P.2d at  
 4 923–24. This cause of action is different from one for breach of contract because it requires  
 5 literal compliance with the terms of the contract. See Kennedy v. Carriage Cemetery Servs., Inc.,  
 6 727 F. Supp. 2d 925, 931 (D. Nev. 2010). Damages under a contractual breach are limited to  
 7 regular contract damages. Mundy v. Household Fin. Corp., 885 F.2d 542, 544 (9th Cir. 1989).  
 8 Accordingly, if a plaintiff is not entitled to contract-based damages, he is therefore not entitled to  
 9 any damages for a contractual breach of the implied covenant. See Shaw v. CitiMortgage, Inc.,  
 10 201 F. Supp. 3d 1222, 1254 (D. Nev. 2016).

11 Rueckl never formed a valid contract with InMode. Supra § III(B)(1). Rueckl’s breach of  
 12 contract claim is barred as a matter of law, and he is, therefore, not entitled to contract-based  
 13 damages. Similarly, InMode could not have fully complied with terms of a non-existent contract.  
 14 Because there is no contract, Rueckl has no available claim for a contractual breach of implied  
 15 covenants of good faith and fair dealing. Accordingly, Rueckl failed to state a plausible claim for  
 16 a breach of the implied covenant and the Court grants the Motion to Dismiss this claim. Because  
 17 the deficiencies of this claim cannot be cured by amendment, dismissal of this cause of action is  
 18 with prejudice.

### 19 **3. Unjust Enrichment (Claim 5)**

20 Under Nevada law, unjust enrichment is an equitable doctrine that allows recovery of  
 21 damages “whenever a person has and retains a benefit which in equity and good conscience  
 22 belongs to another.” Unionamerica Mortg. & Equity Trust v. McDonald, 626 P.2d 1272, 1273  
 23 (Nev. 1981). To state an unjust enrichment claim, a plaintiff must plead and prove three  
 24 elements:

- 25 (1) a benefit conferred on the defendant by the plaintiff;
- 26 (2) appreciation by the defendant of such benefit; and
- 27 (3) an acceptance and retention by the defendant of such benefit under  
 circumstances such that it would be inequitable for him to retain the benefit without  
 payment of the value thereof.

28 Tagiguchi v. MRI Int’l, Inc., 47 F. Supp. 3d 1100, 1119 (D. Nev. 2014) (citing Unionamerica

1 Mortg. & Equity Trust, 626 P.2d at 1273). [B]enefit” in the unjust enrichment context can  
2 include “services beneficial to or at the request of the other,” and is not confined to retention of  
3 money or property. See Certified Fire Prot. Inc. v. Precision Constr., 283 P.3d 250, 257 (Nev.  
4 2012) (citing Restatement of Restitution § 1 cmt. b (1937)). However, where there is an express  
5 contract, an unjust enrichment claim is unavailable. Leasepartners Corp. v. Robert L. Brooks  
6 Trust Dated Nov. 12, 1975, 942 P.2d 182, 187 (Nev. 1997) (finding that the existence of an  
7 express, written agreement bars an unjust enrichment claim because there can be no implied  
8 agreement).

9 Because there was no express contract between Rueckl and InMode, an unjust  
10 enrichment claim is available. However, InMode claims that Rueckl failed to allege any benefit  
11 conferred onto InMode. InMode did not contest Rueckl’s claim that he promoted InModes  
12 products and services. Rather, InMode argued that Rueckl “only vaguely mentions ephemeral  
13 services” and never indicated what benefit InMode received. Regarding Rueckl’s expert  
14 testimony, another uncontested allegation, InMode claims that Rueckl had a duty to truthfully  
15 testify during his deposition and therefore InMode could not have retained a “benefit”. However,  
16 these arguments have no merit.

17 Rueckl alleged he provided several services for InMode including: speaking and  
18 conducting InMode product training sessions in several cities including Las Vegas; and training,  
19 in Las Vegas, over fifty doctors and their staff on the use of InMode treatments. Although  
20 Rueckl does not allege a specific monetary benefit, his services could have been beneficial to  
21 InMode. See Certified Fire Prot. Inc., 283 P.3d at 257. Additionally, whether these services were  
22 or were not “ephemeral” is irrelevant to an unjust enrichment analysis. Rueckl adequately plead  
23 that InMode was unjustly enriched by his promotional services.

24 Additionally, Rueckl properly plead that InMode was unjustly enriched by his services as  
25 an expert witness. Expert witnesses are routinely retained by parties to a lawsuit and are paid for  
26 their services as they convey a benefit onto the retaining party. See, e.g., Logan v. Abe, 350 P.3d  
27 1139, 1143 (Nev. 2015). Rueckl claims he was retained by InMode for the “Candella” lawsuit,  
28 and put in extensive time meeting with InMode’s attorneys, including several in-person

1 meetings, a review of facts, and a deposition. Accordingly, the Court finds that Rueckl has  
 2 adequately alleged that InMode was unjustly enriched by his promotion of InMode's products  
 3 and his services as an expert witness.

#### 4 **4. Promissory Estoppel (Claim 4)**

5 To establish a claim for promissory estoppel a plaintiff must allege: (1) defendant was  
 6 apprised of the true facts; (2) defendant intended that his conduct shall be acted upon, or must so  
 7 act that the party asserting estoppel has the right to believe it was so intended; (3) plaintiff was  
 8 ignorant of the true state of facts; and (4) plaintiff has relied to his detriment on the conduct of  
 9 the party to be estopped. Pink v. Busch, 691 P.2d 456, 459-60 (Nev. 1984). "In general, the party  
 10 claiming estoppel must specifically plead all facts relied on to establish its elements." Nevada  
 11 Nat. Bank v. Huff, 582 P.2d 364, 371 (Nev. 1978).

12 A promise giving rise to the application of the doctrine of promissory estoppel must be  
 13 "clear and unambiguous" in its terms. Hubel v. BAC Home Loans Servicing, LP, No. 2:10-CV-  
 14 1476, 2010 WL 4983456, at \*3 (D. Nev. Dec. 10, 2010). For the court to recognize a promise,  
 15 the promise must be definite enough so that the court can "determine the scope of the duty, and  
 16 the limits of performance must be sufficiently defined to provide a rational basis for the  
 17 assessment of damages." Navarro v. BAC Home Loans LLC, No. 2:11-CV-1557, 2011 WL  
 18 6012547, at \*2 (D. Nev. Dec. 1, 2011) (citing Ladas v. California State Automobile Ass'n, 19  
 19 Cal. App. 4th 761, 770 (1993)). If the promise is "vague, general or of indeterminate  
 20 application," it is not enforceable. Aguilar v. Int'l Longshoremen's Union Local No. 10, 966 F.2d  
 21 443, 446 (9th Cir.1992).

22 Here, the Court agrees with InMode's contention that Rueckl has not alleged a promise  
 23 that is clear and unambiguous in its terms. In his complaint, Rueckl only alleged he was  
 24 promised a total of 10,000 stock options in return for his promotional and expert witness  
 25 services. Rueckl did not indicate what type of shares, the grant and vesting dates, nor the strike  
 26 price. In his response to InMode's Motion to Dismiss, Rueckl clarified that the strike price was  
 27 \$1.00. However, as to the other specificities, he only added that "each option was to be the same  
 28 kind that InMode executives were to receive[.]"

1           The Court cannot enforce such a promise. Even if the Court would consider “each option  
 2           was to be the same kind that InMode executives were to receive” to be an unambiguous term,  
 3           Rueckl has not met his burden of specifying the executives’ type of shares and their grant and  
 4           vesting dates, nor did he claim that each executive, in fact, received identical stock options.  
 5           Without greater specificity as to Rueckl’s rights and InMode’s obligations, the Court would have  
 6           no rational basis upon which to assess damages. Accordingly, the Court finds that Rueckl has  
 7           failed to sufficiently allege a claim for promissory estoppel. Because it is not certain that the  
 8           deficiencies of the claim cannot be cured by amendment, the Court grants leave to amend this  
 9           cause of action.

#### 10                   **5. Negligent Misrepresentation (Claim 1) & Fraud (Claim 6)**

11           To establish a claim for negligent misrepresentation, a plaintiff must allege: 1) a  
 12           representation that is false; 2) that the representation was made in the course of the defendant's  
 13           business or in any action in which he has a pecuniary interest; 3) the representation was for the  
 14           guidance of others in their business transactions; 4) the representation was justifiably relied  
 15           upon; 5) that such reliance resulted in pecuniary loss to the relying party; and 6) that the  
 16           defendant failed to exercise reasonable care or competence in obtaining or communicating the  
 17           information. G.K. Las Vegas Ltd. v. Simon Prop. Group, Inc., 460 F. Supp. 2d 1246, 1262 (D.  
 18           Nev. 2006). Negligent misrepresentation must be plead with particularity including allegations of  
 19           the time, place, nature of the fraud, and specific parties involved. Vess v. Ciba-Geigy Corp.  
 20           USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

21           To establish a claim for fraud, a plaintiff must allege (1) a false representation made by  
 22           the defendant; (2) defendant’s knowledge or belief that its representation was false or that  
 23           defendant has an insufficient basis of information for making the representation; (3) defendant  
 24           intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4)  
 25           damage to the plaintiff as a result of relying on the misrepresentation. Barmettler v. Reno Air,  
 26           Inc., 956 P.2d 1382, 1386 (Nev. 1998). Additionally, like negligent misrepresentation, a plaintiff  
 27           asserting a claim for fraud must also establish justifiable reliance. Collins v. Burns, 741 P.2d  
 28           819, 821 (Nev. 1987).

1 InMode argues that Rueckl's negligent misrepresentation and fraud claims against  
2 InMode fail for lack of adequate pleading of justifiable reliance. InMode claims that Rueckl  
3 should not have justifiably relied on Lodwig's misrepresentation because it is common  
4 knowledge that stock options sales require terms indicating the type of shares and vesting and  
5 redemption dates. Therefore, a highly educated individual like Rueckl could not have justifiably  
6 relied stock option agreements missing these essential terms. Additionally, InMode claims that  
7 given the clear requirements of N.R.S. 78.200, Rueckl could not have justifiably relied on an oral  
8 agreement for stock options as compensation for his services. However, these assertions do not  
9 warrant dismissal of these claims.

10 While a lack of justifiable reliance bars recovery in fraud and negligent misrepresentation  
11 claims, "this principle does not impose a duty to investigate absent any facts to alert the  
12 defrauded party his reliance is unreasonable." Collins, 741 P.2d at 821. "The test is whether the  
13 recipient has information which would serve as a danger signal and a red light to any normal  
14 person of his intelligence and experience." Id.

15 Rueckl adequately pled facts for justifiable reliance. Rueckl claims he inquired about the  
16 need for written documentation and was assured that everything was handled. He claims he had  
17 prior dealings with InMode and had no reason to suspect he could not rely on their  
18 representations. Additionally, absent any authority, the Court will not resolve whether a  
19 physician should have the pertinent knowledge of stock options transactions and the Nevada  
20 statutes that regulate them. Accordingly, the Court finds that Rueckl adequately alleged negligent  
21 misrepresentation and fraud.

#### 22 **IV. Conclusion**

23 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (ECF No.  
24 10) is **GRANTED in part and DENIED in part**;

25 IT IS FURTHER ORDERED that the motion to dismiss based on lack of personal  
26 jurisdiction is **DENIED**;

27 IT IS FURTHER ORDERED that the motion to dismiss the breach of contract, breach of  
28 the implied covenant of good faith and fair dealing, and promissory estoppel claims is

1 **GRANTED;**

2 IT IS FURTHER ORDERED that the motion to dismiss the claims for unjust enrichment,  
3 negligent misrepresentation, and fraud is **DENIED;**

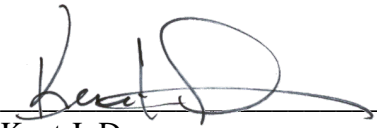
4 IT IS FURTHER ORDERED that Plaintiff's breach of contract and breach of the implied  
5 covenant of good faith and fair dealing claims are **DISMISSED with prejudice;**

6 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint containing the  
7 claims that have not been dismissed and amending the claim for promissory estoppel within  
8 fourteen (14) days of the entry of this order, failure to do so will result in final dismissal of the  
9 promissory estoppel claim

10 IT IS FURTHER ORDERED that Plaintiff's Motion for Limited Jurisdictional Discovery  
11 (ECF No. 38) is **DENIED as moot;**

12 IT IS FINALLY ORDERED that Plaintiff's Objections to the Magistrate Judge's Order  
13 (ECF No. 37) is **DENIED as moot.**

14 Dated this 27th day of July, 2020.

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16   
17 Kent J. Dawson  
18 United States District Judge  
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